No. 94-12

(14)

Supreme Court, U.S.
FILED
MAR 31 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

v.

STATE OF FLORIDA, et al.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* TOHONO O'ODHAM NATION, WHITE MOUNTAIN APACHE TRIBE, and PASCUA YAQUI TRIBE IN SUPPORT OF PETITIONER SEMINOLE TRIBE OF FLORIDA

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QUESTION PRESENTED

DOES THE *EX PARTE YOUNG* DOCTRINE PERMIT SUITS AGAINST A STATE GOVERNOR FOR PROSPECTIVE INJUNCTIVE RELIEF TO ENFORCE LEGISLATION ENACTED PURSUANT TO THE INDIAN COMMERCE CLAUSE, ARTICLE I, SECTION 8, CLAUSE 3 OF THE CONSTITUTION?

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INTEREST OF *AMICI CURIAE*

The Tohono O'odham Nation, White Mountain Apache Tribe, and Pascua Yaqui Tribe (the "Tribes") are federally recognized Indian tribes occupying and governing Indian lands within the State of Arizona.[1] The Pascua Yaqui Tribe and the Tohono O'odham Nation have been operating high stakes gaming on their lands near the City of Tucson, Arizona since the mid-1980s. After Congress adopted the Indian Gaming Regulatory Act in 1988, codified at 25 U.S.C. § 2701 *et seq.*, ("IGRA") the *amici* Tribes requested that the Governor of Arizona enter into class III tribal-state gaming compacts. The Tribes and the Governor could not agree on compact terms, and so in 1992 the Tribes brought an action in federal court for the District of Arizona to invoke the remedial provisions of IGRA and obtain compacts.[2]

The *amici* Tribes and nearly 100 other tribes throughout the country have successfully followed the procedures under IGRA and now have compacts with states.[3]

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[1] Counsel of record for each party in this case consent to the filing of this brief. Letters of consent have been lodged with the Clerk.

[2] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292 (D.Ariz. 1992), *appeal dismissed*, No. 92-16954 (9th Cir. Mar. 14, 1994).

[3] IGRA has been widely successful in resolving disputes over Indian gaming. As of February 1995, 98 tribes in 22 states had class III compacts approved by the Secretary of Interior under IGRA. Bureau of Indian Affairs, *Tribal-State Compact List* (Jan. 26, 1995) (unpublished list on file with the Bureau of Indian Affairs).

For the *amici* Tribes, gaming under their approved compacts is now providing substantial funds to subsidize badly needed governmental services and build significant capital infrastructure for future development. Their compacts will not be directly affected if the Court affirms the Court of Appeals' decision below. However, the *amici* Tribes have already faced one collateral constitutional challenge to their compacts by third parties. If IGRA is found to be unconstitutional in this case, even in part, all settled compacts will be subject to the risk of further litigation and the success of class III gaming will again be frustrated.

The experience of the *amici* Tribes and the State of Arizona under IGRA demonstrates that the Act's remedial provisions actually work and, if pursued in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994), would not violate the Eleventh Amendment rights of the State of Florida or its Governor. As happened in Arizona, government officials in Florida will be able to choose whether they want to participate in each stage of the IGRA process. Should the State choose not to participate, no Florida official will be subjected to any coercive order from the district court. Florida's Eleventh Amendment concerns are completely theoretical and should be rejected.

Opposition to gaming on Indian reservations, for whatever reason, does not make out an Eleventh Amendment claim. After several years of public debate and much input from the states, IGRA was carefully crafted by Congress to fully protect the states' Eleventh Amendment rights and, at the same time, encourage states and tribes to enter into compacts. The IGRA remedial process

was adopted to permit states to regulate gaming, if they so desired, but it was not intended to allow states to veto a tribe's right to conduct class III gaming.[4]

The Experience of Arizona Tribes under IGRA

The Tohono O'odham Nation began operating class III gaming on its lands near Tucson, Arizona before Congress adopted IGRA.[5] The Pascua Yaqui Tribe also offered high stakes bingo and video gaming machines to the public on its Reservation facility on the edge of Tucson before 1988.[6] Beginning in November 1991, the White

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[4] S. Rep. No. 446, 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 3071, 3079 ("It is the Committee's intent that the compact requirement for class III not be used as a justification by a state for excluding Indian tribes from such gaming . . . "). *See Statement of Senator D. Inouye, Chm., Select Comm. on Indian Affairs, Before the Oversight Hearing on the Implementation of the Indian Gaming Regulatory Act*, May 6, 1992, *reproduced* at App. 4.

[5] The 2.8 million acre Reservation of the Tohono O'odham Nation is in southern Arizona, sharing a large common boundary with Mexico. There are about 18,000 tribal members. The Tohono O'odham Nation has very limited natural resources and almost no infrastructure for economic development. There are very few employers on the Reservation and, consequently, the tax base is quite small. In 1992, nearly one-half of all of the Nation's general operating funds, other than those funds received for the administration of state and federal contracts and grants, came from gaming. *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292 (D.Ariz. 1992) (Ex. G. Moore Aff., C.R. 77).

[6] The Pascua Yaqui Tribe has over 7,000 members. In 1991, over 66 percent of the *employed* tribal members earned less than $7000 per year. *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292 (D.Ariz. 1992) (Ex. F. Gastelum Aff., C.R. 77).

Mountain Apache Tribe opened two small gaming facilities on its Reservation, one at Hondah near Pinetop, Arizona and one at the Tribe's Sunrise Ski Park.[7] The governments of the *amici* Tribes relied heavily on gaming as a major supplement to scarce government revenues.

After IGRA became law and pursuant to its provisions, the Tribes asked the State of Arizona to negotiate class III compacts so the Tribes could continue their gaming businesses. Despite numerous requests and efforts on both sides during the administrations of several Governors of Arizona, the State would not agree to compacts with tribes in Arizona. Negotiations between the State and the Tribes reached an impasse due solely to a dispute as to the scope of class III gaming allowable in Arizona and the State's duty to negotiate over various forms of class III gaming activity for possible inclusion in a tribal-state compact.[8] In the meantime, the Tribes' high stakes gaming operations remained open.

On February 24, 1992, the district court in Arizona allowed the *amici* Tribes to intervene in a previously-filed action in order to pursue a claim against the Governor and the State of Arizona under IGRA. *See* 25 U.S.C. § 2710(d)(7)(B). The Tribes sought a declaration that certain gaming, including video gaming, was "permitted for

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[7] The gaming facilities employed approximately fifty persons, ninety percent of whom were tribal members. *Yavapai-Prescott Tribe v. Arizona*, 796 F.Supp. 1292 (D.Ariz. 1992) (Ex. H. Lupe Aff., C.R. 77).

[8] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. at 1294.

any purpose" in Arizona, and thus, could be included in a compact.[9]

The Governor took the position that IGRA only required negotiation of compacts for gaming which was both authorized and regulated under Arizona law. According to the Governor, such gaming included only lottery and para-mutuel wagering on horse and dog racing. The Tribes maintained that other forms of gaming should be included in compacts because casino games were both authorized under Arizona law and widely used for charitable fund raising events, and because Arizona law authorized social gambling and the widespread sale and use of slot machines.[10] The Tribes and the Governor stipulated to the court that negotiations had reached an impasse on this legal issue.[11]

The Governor also moved to dismiss the Tribes' Complaint on the grounds that the provisions of IGRA which direct states to negotiate with tribes in good faith, and which authorize the district court to appoint a mediator, violate the Tenth Amendment to the United States Constitution.[12] Arizona never asserted an Eleventh Amendment defense in this litigation.

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[9] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. at 1294.

[10] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292 (D.Ariz. 1992) (Pls.'/Intervenors' Mot. for Summ. J., May 4, 1992, C.R. 77).

[11] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. at 1294.

[12] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292 (D.Ariz. 1992) (State's Mot. to Dismiss, March 23, 1992, C.R. 58).

On May 12, 1992, while summary judgment motions were pending in the district court, federal marshals enforced warrants at all on-going tribal gaming operations in Arizona, taking approximately 750 video gaming machines, including 257 machines from the Tohono O'odham Nation.[13]

Arizona tribes were placed in a difficult situation. Federal law granted the tribes the right to engage in class III gaming under compacts, but the Governor of Arizona refused to agree to compacts.[14] The *amici* Tribes could not continue operating their video machines without compacts. The Tribes had federal rights but for four years they had tried unsuccessfully to negotiate compacts. The IGRA remedial provisions were the only effective way to enforce their federal rights.

The public overwhelmingly supported the continuation of class III gaming by the tribes.[15] The Governor of Arizona reacted by offering a uniform compact limiting each tribe to only 250 machines, regardless of tribal population or financial need. The smaller tribes in Arizona accepted the Governor's offer. The *amici* Tribes did not.

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[13] Michelle Henry, *Tribes to March on Capitol*, Tempe Daily News Trib., May 17, 1992, Jonathan Sidener, *U.S. Offers Tribes Compromise*, Ariz. Republic, May 15, 1992, at A-2.

[14] The Governor of Arizona was a defendant in *Yavapai-Prescott* because under state law he was the state official who assumed the federal law duty to negotiate with tribes. *See* A.R.S. § 5-601. The Governor of Florida is in the same position in the *Seminole* case. (*See* Brief of Petitioner Seminole Tribe at 23.)

[15] *See, e.g.*, Editorial, *Don't Deny Indians' Right To Try Gaming Industry*, USA Today, May 20, 1992, 10A.

Instead, these Tribes continued to pursue their IGRA remedies under the supervision of the federal court.[16]

The District Court's Rulings

Based upon a detailed factual record of the extent and types of gaming conducted in Arizona, the district court granted summary judgment in favor of the Tribes and, pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii), declared a 60-day time limit for the parties to conclude negotiations for class III compacts. The court refused to specify what types of gaming must be the subject of negotiation. *Yavepai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. at 1296. The legislative history of IGRA persuaded the court that Congress wanted to offer states the "unique opportunity to participate in the regulation of class III gaming on Indian lands," and the court hoped that mutual self-interest would motivate the State and the Tribes to negotiate. *Id.* at 1296-97. The court stated that "IGRA's terms do not force the State to enter into a compact, it only demands good faith negotiation. . . . " *Id.* at 1297. The court did not order the Governor to agree to a compact,

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[16] The Governor's offer of a "one size fits all" compact allowing only 250 video machines was unacceptable to the large *amici* Tribes. It simply would not allow them the "means of promoting tribal economic development, self-sufficiency, and strong tribal governments" that Congress sought to provide in adopting IGRA. *See* 25 U.S.C. § 2702. The smallest two tribes in Arizona average just 113 members, while the largest two average 91,229 members. Arizona Comm'n of Indian Affairs, *1993-1994 Tribal Directory of the 21 Federally Recognized Indian Tribes of Arizona* at p. v. (Arizona Comm'n of Indian Affairs, ed., Sept. 1993).

nor would the court penalize the State if the Governor refused to agree to a compact. The court simply ordered that,

> in the event a compact is not concluded within sixty days, the parties shall each submit on the sixtieth (60) day to a mediator appointed by the Court a proposed compact that represents their last best offer for a compact.

Id. at 1298.

At a later hearing, the court denied the Governor's motion for a stay pending appeal, holding that IGRA does not compel the Governor to enter into compacts with tribes but simply provides states the opportunity to become involved in regulating Indian gaming, if they so desire. If a state chose not to participate, according to the court, then the Secretary of Interior would promulgate procedures to regulate class III gaming on the affected reservation. *See* 25 U.S.C. § 2710(d)(7)(B)(vii). The district court held:

> Because this Court has determined that IGRA is not violative of the Tenth Amendment, because it does not coerce the state to do anything other than to have the opportunity to participate in Indian gaming on reservations, it does not appear to the Court that the motion for stay should be granted.
>
> . . . Congress has simply given the opportunity to the state to participate. . . .
>
> * * *
>
> . . . There is no coercion placed upon the state, only an opportunity to participate.

Yavapai-Prescott Indian Tribe v. Arizona, 796 F.Supp. 1292 (D.Ariz. 1992) (Hr'g. Tr. Dec. 4, 1992, at 18). Arizona appealed the district court's Order declaring a deadline for negotiations.[17]

The Mediation Process

Negotiations continued but Arizona and the Tribes were unable to agree to a compact during the sixty day period for negotiations. As a result, the court followed the IGRA remedial procedures and selected a former Chief Justice of the Arizona Supreme Court as IGRA mediator. *See* 25 U.S.C. § 2710(d)(7)(B)(iv). The Governor then submitted to the mediator his Last Best Offer and each of the *amici* Tribes submitted theirs. After all parties had ample opportunity to present evidence and briefs in support of their positions, the mediator selected the Tribes' Last Best Offers.[18] On February 22, 1993, the

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[17] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292 (D.Ariz.), *appeal filed*, No. 92-16954 (9th Cir. Oct. 27, 1992).

[18] In his decision, Chief Justice Gordon noted that one of the express objectives of Congress in passing IGRA was to provide a "means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. As a result of touring the Tohono O'odham Reservation with all parties during the mediation process, Chief Justice Gordon wrote:

> Although I have resided in Arizona all but six months of my life, and have seen living conditions on several Indian reservations in Arizona, I was shocked to see the substandard housing, medical and educational conditions that existed on the Tohono O'odham Reservation. The elderly, sick and disabled on that reservation live in conditions not unlike many third

mediator submitted the selected compacts to the State of Arizona pursuant to 25 U.S.C. § 2710(d)(7)(B)(v).[19]

As permitted under IGRA, after the Governor fully participated in the last best offer mediation, he chose not to agree to the compacts selected by the mediator. Therefore, the mediator so notified the Secretary of Interior, pursuant to the procedures established in IGRA, which thereby enabled the Secretary to prescribe procedures for class III gaming, in consultation with the Tribes. 25 U.S.C. § 2710(d)(7)(B)(vii).[20] The IGRA procedures were successfully completed and no coercive order had been entered against Arizona or its Governor by the district court.

At that point, though, the Governor and the Tribes, with the assistance of the Secretary of Interior, were able to finally reach agreement on terms for compacts. The Governor and the *amici* Tribes, together with approximately nine other Arizona tribes, then voluntarily entered into class III compacts under 25 U.S.C. § 2710(d)(3)(B). The compacts allow the State to monitor

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> world countries in Africa today. . . . These conditions would not be allowed to exist anywhere else in Arizona. Even counsel for the state in this matter did not dispute the dire economic needs of the tribes involved.

Yavapai-Prescott Indian Tribe v. Arizona, No. M-93-0001 (D.Ariz. Feb. 15, 1993), *reprinted in* 20 Indian Law Reporter 3081 (1993) (Decision reproduced at App. 11).

[19] *See* Letter of A. Deer, Asst. Sec. of Interior, to Chm. Listo, dated July 30, 1993, reproduced at App. 1.

[20] *See* Letter of A. Deer, Asst. Sec. of Interior, to Chm. Listo, dated July 30, 1993, reproduced at App. 1.

the regulation of gaming on Indian lands and require that tribes reimburse the State for all of its costs incurred under the compacts. The *amici* Tribes' compromise class III compacts were approved by the Secretary of Interior on July 30, 1993.[21] Ultimately, the IGRA remedial provisions worked in Arizona. IGRA produced compacts without judicial coercion.

The Compacts are Challenged in the Ninth Circuit

Soon after the Governor and the Tribes agreed to the class III compacts, Arizona moved to dismiss its appeal pending in the Ninth Circuit. *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292 (D.Ariz.), *appeal filed*, No. 92-16954 (9th Cir. Oct. 27, 1992). It was at that point that four Arizona off-reservation gambling operators (American Greyhound Racing, Inc., Western Greyhound Racing, Inc., Southern Arizona Greyhound Racing, Inc., and Tucson Greyhound Park, Inc.) moved to intervene in the appeal to oppose the voluntary dismissal. The dog tracks claimed that Indian gaming would adversely affect their gaming businesses and they wanted to pursue the Tenth Amendment challenge to the Arizona-Tribal compacts. Eventually, the Ninth Circuit dismissed Arizona's appeal.[22]

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[21] *See* 58 Fed.Reg. 44,000 (1993); 58 Fed.Reg. 44,002 (1993); 58 Fed.Reg. 44,010 (1993).

[22] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292 (D.Ariz. 1992), *appeal dismissed*, No. 92-16954 (9th Cir. Mar. 14, 1994).

The *amici* Tribes are concerned that if any part of IGRA is ruled violative of the Eleventh Amendment, their class III compacts, which have settled all tribal gaming disputes in Arizona, as well as other successful compacts, might again be subject to collateral challenge. In addition, these and most other compacts have a term of years. As a result, the Tribes may need to rely on the remedial provisions of IGRA again to resolve disputes that could arise during renewal negotiations.

ARGUMENT

The *Ex parte Young* Doctrine Applies and Permits the Suit Against the Governor of Florida to Invoke the IGRA Remedial Provisions

The Eleventh Amendment was adopted to prevent federal courts from entering judgments that must be paid out of state treasuries. As this Court recently held,

> [C]ourts of appeals have recognized the vulnerability of the state's purse as the most salient factor in Eleventh Amendment determinations . . . In sum . . . the vast majority of circuits . . . have concluded that the state treasury factor is the most important factor to be considered . . . and, in practice, have generally accorded this factor dispositive weight.

Hess v. Port Auth. Trans-Hudson Corp., ___ U.S. ___, 115 S.Ct. 394, 404 (1994).

If the Court concludes that Congress cannot waive a state's immunity through its adoption of IGRA, the Seminole Tribe can still obtain complete relief if the Governor

remains a defendant under *Ex parte Young*, 209 U.S. 123 (1908). The Eleventh Amendment does not prevent federal courts from prospectively compelling state officials to obey federal law, nor does it disable federal courts or Congress from fashioning prospective remedies to protect the federal statutory rights of a plaintiff. *Green v. Mansour*, 474 U.S. 64, 68 (1985).

The IGRA remedial provisions pose no threat to Florida's treasury and the State does not need to be a defendant in *Seminole*. The Eleventh Circuit misapplied *Ex parte Young* and ignored the limited role Congress gave to the federal courts under IGRA to set the clock for negotiations and to select a mediator, if necessary. First, the court below concluded that *Ex parte Young* was inapplicable because the conduct affected by IGRA involved official government duties. 11 F.3d at 1029. In addition, the court concluded, incorrectly, that *Ex parte Young* was inapplicable because under IGRA a state official is allowed to exercise discretion, namely, determining whether or not to negotiate a compact, negotiating a compact, and enforcing a compact. *Id.* at 1028.

The court was wrong on both counts. The fact is, all *Ex parte Young* cases involve official government duties. There is certainly no limitation on using the *Ex parte Young* doctrine to compel official conduct.[23] *Ex parte*

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[23] The *Ex parte Young* fiction that allows suits against state officers despite the Eleventh Amendment is not concerned with whether a state officer's conduct is "official," but whether the relief ordered by the court is in fact only prospective. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984); *Edelman v. Jordan*, 415 U.S. 651, 664-65, 667 (1974).

Young has allowed the enforcement of sweeping federal court injunctive relief requiring state officers to prospectively conform their official conduct to the legitimate mandates of federal law.[24]

The court of appeals also misapplied an *Ex parte Young* exception for discretionary acts.[25] The discretion available to a state under IGRA survives even if the remedial procedures of IGRA are invoked. The Act does *not* authorize the district court to require that the State of Florida agree to a compact. The Eleventh Circuit seemed to believe that the Governor or the State of Florida might be compelled by the district court to negotiate, sign, and perform under a compact. 11 F.3d at 1028. IGRA's remedies were carefully written to avoid this type of judicial interference with state affairs. *See Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. at 1297. The *amici* Tribes' experience in Arizona certainly demonstrates that a state's discretion to sign or not sign a compact – to get involved in the regulation of Indian gaming or not – remains with the state throughout the IGRA remedial process.

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[24] *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 88-89 (1989) (J. Brennan dissenting, discusses the *Ex parte Young* fiction and recognizes all such cases are in practical effect against the state).

[25] The law of injunction and mandamus is concerned with discretion in general. A court in equity will consider the scope of an officer's discretion to determine whether an applicant is entitled to an equitable remedy and to set the terms of the remedy. *Puerto Rico v. Branstad*, 483 U.S. 219, 227 (1987). An equity court's concern over discretionary duties is inapplicable when the court is administering a narrow, carefully prescribed, remedial process crafted by Congress.

While mandating "good faith negotiations", IGRA offers states an opportunity to become involved in tribal gaming. Provided they negotiate in good faith, states are given the *opportunity* to negotiate over both the scope and regulation of gaming in Indian country. This is precisely what the states sought when Congress was considering IGRA.[26] If a state chooses to opt out of the IGRA process, regulation of class III gaming will be resolved by the Secretary of Interior without state participation. IGRA gives that choice to state officials and the Act's judicial remedies do not empower the courts to take the state's options away. The court supervised remedy under IGRA is procedural only. IGRA provides a procedure to allow tribes to ultimately obtain a compact when class III gaming is authorized under federal law, either with a state or the Secretary. The fact that Congress has given states a voice in the regulation of Indian gaming – if they want it – does not violate the state's Eleventh Amendment rights.

The Eleventh Amendment analysis must look to the specific relief which a district court may grant. Under IGRA, the district court will not need to compel *any* state official to do *anything*. If the district court determines that a state has failed to negotiate or has negotiated in bad faith, the court merely announces a sixty-day period for the parties to conclude negotiations. 25 U.S.C. § 2710(d)(7)(B)(iii). This determination involves no coercive orders from the district court. There is no coercive

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[26] *See Statement of Senator D. Inouye, Chm., Select Comm. on Indian Affairs, Before the Oversight Hearing on the Implementation of the Indian Gaming Regulatory Act*, May 6, 1992, *reproduced* at App. 4.

order if state officials do not negotiate during the sixty days. If they choose to continue negotiations, they do not become obligated to sign a compact. However, if no compact is agreed to at the end of the sixty days, as occurred in Arizona, the court then appoints a mediator. 25 U.S.C. § 2710(d)(7)(B)(iv).

Similarly, the mediator has no coercive authority over either party during the mediation process. A state can choose either to submit a last best offer or not. If the state fails to make an offer, the mediator will choose the tribe's offer. In Arizona, the State elected to fully participate in the last best offer mediation process, but then chose not to accept the mediator's decision.[27] IGRA clearly leaves that choice to the state. As the Arizona district court noted, "If the State declines to accept the compact chosen by the mediator, that is the end of the matter insofar as state participation is concerned." *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. at 1297. Neither the court nor the mediator may take any coercive action under IGRA against the state after the state chooses whether to accept the mediator's decision. Should the state refuse to accept the mediator's choice, under IGRA the mediator advises the Secretary of Interior and the Secretary then promulgates regulations, in lieu of a compact, that will define the

[27] As the Arizona Mediator observed, "under the Act, true mediation is not contemplated." *Yavapai-Prescott Indian Tribe v. Arizona*, No. M-93-0001 (D.Ariz. Feb. 15, 1993), App. 12. IGRA mediation is non-binding, last best offer arbitration. By participating, the state motivates the tribe to submit a more moderate last best offer or risk the mediator choosing the state's offer. However, the state can still reject the decision. The state gets the best of both worlds.

scope and regulation of gaming on that reservation. Federal regulation of tribal gaming is clearly a permissible outcome under federal law and also has no Eleventh Amendment implications. As happened in Arizona, however, even at that last step in the process, when the Secretary is considering gaming regulations for the tribe, the state and tribe can still voluntarily enter into compacts.

Properly applied, IGRA works and culminates in a compact, with regulations either consented to by the state or written by the Secretary and enforced by federal and tribal officials, without a district court ever having to order coercive relief against state officials.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals and allow the IGRA remedial procedures to go forward.

Respectfully submitted,

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March 31, 1995

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[LOGO] [LOGO]

United States Department of the Interior

OFFICE OF THE SECRETARY
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JUL 30 1993

Honorable Sylvester Listo
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Sells, Arizona 85634

Dear Chairman Listo:

On June 29, 1993, we received the compact between the Tohono O'odham Nation (Nation) and the State of Arizona (State), dated June 24, 1993.

This compact has a unique history. In *Yavapai-Prescott v. Arizona*, No. 91-1696 (D. Az.), several Arizona tribes sued the State of Arizona for failing to negotiate, in good faith, Class III tribal-state gaming compacts. Thereafter, four tribes negotiated compacts with the State. Three tribes, the Tohono O'odham, White Mountain Apache and Pascua Yaqui, were unable to reach agreement with the State. As a result, the three tribes and the State were required to submit their last, best compact offers to a court-appointed mediator under 25 U.S.C. § 2710(d)(7) of the Indian Gaming Regulatory Act (IGRA). The mediator was required to choose the compacts which best comported with the terms of the IGRA. In all three instances, the mediator chose the tribes' compacts. The State, however, declined to consent to the proposed compacts.

Upon the expiration of the time period in which the State could accept the compacts, the mediator submitted the compacts to the Secretary to prescribe gaming procedures. Although the compacts chosen by the mediator were submitted to the Secretary, the three tribes and the Governor had agreed to continue their compact negotiations to resolve differences and to settle the pending lawsuit. The parties were able to reach agreements which resulted in negotiated compacts. The compacts were then submitted to the Department for approval in lieu of Secretarial procedures. We find nothing in the IGRA which precludes the State and Nation from concluding a compact and substituting it for the development of procedures.

We have completed our review of your Compact and conclude that it does not violate the IGRA, Federal law or our trust responsibility. Therefore, pursuant to my delegated authority and Section 11 of the IGRA, we approve the Compact. The Compact shall take effect when the notice of our approval, pursuant to Section 11 (d)(3)(b) of IGRA, 25 U.S.C. § 2710(d)(8)(D) is published in the FEDERAL REGISTER.

Notwithstanding our approval of the Compact, be advised that Section 11(d)(1) of the IGRA, 25 U.S.C. § 2710(b)(1)(B) requires that gaming cannot be conducted without a tribal gaming ordinance approved by the Chairman of the National Indian Gaming Commission (NIGC). On July 8, 1992, the NIGC published in the FEDERAL REGISTER proposed regulations to govern the approval of Class II and Class III gaming ordinances. The final regulations were published in the FEDERAL REGISTER on January 22, 1993 (58 Fed. Reg. 5802), and became

effective on February 22, 1993. Pursuant to the IGRA and the regulations, even previously existing gaming ordinances must be submitted to the NIGC for approval when requested by the Chairman.

In addition, if the Nation intends to enter into a management contract for the operation and management of the Nation's gaming facility, the contract must likewise be submitted to, and approved by the Chairman of the NIGC pursuant to Section 11(d)(9) of the IGRA, 25 U.S.C. § 2710(d)(9) and the NIGC's regulations governing management contracts. The Nation may want to contact the NIGC at (202) 632-7003 for further information on submitting the ordinance and the management contract for approval by the NIGC.

We wish the Nation and the State success in their economic venture.

Sincerely,

/s/ Ada E. Deer
Assistant Secretary –
Indian Affairs

Enclosures

STATEMENT OF SENATOR DANIEL K. INOUYE
CHAIRMAN, SELECT COMMITTEE ON INDIAN
AFFAIRS BEFORE THE MAY 6, 1992 OVERSIGHT
HEARING ON THE IMPLEMENTATION OF THE
INDIAN GAMING REGULATORY ACT

GOOD MORNING. OUR HEARING TODAY IS THE THIRD IN A SERIES OF THREE OVERSIGHT HEARINGS ON THE IMPLEMENTATION OF THE INDIAN GAMING REGULATORY ACT.

THE COMMITTEE'S FIRST HEARING ON THE IMPLEMENTATION OF THE ACT, HELD ON FEBRUARY 5TH OF THIS YEAR, FOCUSED UPON THE IMPLEMENTATION ACTIVITIES OF THE VARIOUS FEDERAL AGENCIES CHARGED WITH RESPONSIBILITIES UNDER THE ACT.

ON MARCH 18TH, THE COMMITTEE HELD A SECOND HEARING ON THE TRIBAL/STATE COMPACTING PROCESS. TODAY, WE ADDRESS THE ACTIONS THAT TRIBAL GOVERNMENTS HAVE TAKEN TO IMPLEMENT THE ACT, BOTH IN TERMS OF REGULATION AND LAW ENFORCEMENT.

WE ARE AT A VERY CRITICAL POINT IN THE HISTORY OF THE INDIAN GAMING LAW, AND IF I MAY, I WOULD LIKE TO TAKE A FEW MOMENTS TO DESCRIBE THIS CRISIS FROM MY POINT OF VIEW.

IT HAS BEEN SEVERAL YEARS NOW, SINCE I BEGAN THIS PROCESS, IN 1987, OF DEVELOPING THE GAMING LAW – AS CHAIRMAN OF THE SELECT COMMITTEE ON INDIAN AFFAIRS. AT THE TIME, WE WERE ALL AWARE OF WHY THIS EFFORT HAD TO BE UNDERTAKEN.

THE SUPREME COURT HAD JUST RULED IN THE *CABAZON* CASE, AND IF THE DECISION HAD BEEN IMPLEMENTED NATIONWIDE, THE RESULT WOULD HAVE BEEN CHAOTIC. THERE WOULD HAVE BEEN ALMOST NO CONTROL OR ADMINISTRATION OF GAMING ACTIVITIES IN THE VARIOUS JURISDICTIONS.

BECAUSE OF THE UNITED STATES' TRUST RELATIONSHIP WITH THE INDIAN NATIONS AND THE LONG-ESTABLISHED EXCLUSION OF STATE JURISDICTION IN INDIAN COUNTRY, WE FIRST EXAMINED THE POSSIBILITY OF A FEDERAL COMMISSION THAT WOULD BE RESPONSIBLE FOR THE REGULATION OF INDIAN GAMING, AS WELL AS ASSOCIATED LAW ENFORCEMENT RESPONSIBILITIES, WHICH WOULD BE SHARED WITH THE TRIBAL GOVERNMENTS.

FOR THE MOST PART, MANY OF THE INDIAN LEADERS WERE FAVORABLY INCLINED TO THIS PROPOSITION, BECAUSE IT WOULD ALLOW THE TRADITIONAL RELATIONSHIP OF THE FEDERAL GOVERNMENT TO INDIAN COUNTRY TO CONTINUE, AND THE GAMING ACTIVITIES WOULD BE THE RESULT OF A COMPACT BETWEEN THE UNITED STATES AND THE INDIAN GOVERNMENTS.

WHEN THIS WAS MADE KNOWN, THE SEVERAL STATES, ALMOST IN A CHORUS, CAME OUT WITH A RESOUNDING "NO!". THEY ARGUED THAT AFTER ALL, THESE ACTIVITIES WOULD BE TAKING PLACE WITHIN STATE BORDERS, AND THE STATES WANTED SOME ROLE TO PLAY IN THE DETERMINATION OF

WHAT GAMING ACTIVITIES WOULD BE CONDUCTED ON RESERVATION LANDS.

IT WAS THE STATES WHO ADVOCATED FOR A TRIBAL/STATE COMPACT PROVISION IN THE ACT. IT WAS THE STATES THAT WANTED THE "LEVEL PLAYING FIELD." IT WAS THE STATES THAT WANTED TO NEGOTIATE WITH THE INDIAN NATIONS ON A GOVERNMENT-TO-GOVERNMENT BASIS.

AND, IT WAS I, AS CHAIRMAN OF THE COMMITTEE, WHO WAS SADDLED WITH THE UNENVIABLE TASK OF URGING THE TRIBAL GOVERNMENTS, TO ACCEPT THIS FORMULATION. THE TRIBAL GOVERNMENTS DID NOT WANT THE TRIBAL/STATE COMPACTS. IT WAS THE STATES THAT WANTED THE COMPACTS.

SO WE SET UP THIS PROVISION OF THE LAW – THE TRIBAL/STATE COMPACT PROVISION – WHERE WE CALLED UPON THE INDIAN TRIBAL GOVERNMENTS TO SET ASIDE SOME OF THEIR SOVEREIGN RIGHTS IN RETURN FOR WHAT THEN APPEARED TO BE A RATIONAL SCHEME OF MANAGEMENT OF GAMING ACTIVITIES ON INDIAN LANDS.

IN EXCHANGE FOR GIVING UP SOME OF THEIR SOVEREIGN ACTIVITIES, WE WAIVED THE JOHNSON ACT WHEREVER A TRIBAL/STATE COMPACT WAS IN PLACE, AND WE PROVIDED THAT IF A STATE ALLOWED CLASS III GAMING FOR CHARITABLE PURPOSES, CLASS III GAMING COULD BE A SUBJECT OF COMPACT NEGOTIATIONS BETWEEN THE TRIBAL AND STATE GOVERNMENTS.

AND NOW IT IS THE STATES THAT SEEK TO AVOID THE COMPACTS, NOT THE TRIBAL GOVERNMENTS.

THIS IS JUST A BRIEF DESCRIPTION OF WHAT TRANSPIRED AT THE TIME OF THE ACTS CONSIDERATION IN THE CONGRESS.

TODAY, WE COME TO THIS IMPASSE. WE HAVE A STATE WHERE A COMPACT HAS BEEN REACHED BUT THE GOVERNOR REFUSES TO SIGN THE COMPACT AND THE GOVERNOR IS ASSERTING THE ELEVENTH AMENDMENT IMMUNITY TO SUIT BY THE TRIBAL GOVERNMENT WITH WHOM THE COMPACT WAS NEGOTIATED.

OTHER STATES HAVE ASSERTED THE ELEVENTH AMENDMENT AS A BAR TO ENGAGING IN NEGOTIATIONS FOR A TRIBAL/STATE COMPACT, AND THIS PRACTICE IS DAILY BECOMING MORE WIDESPREAD.

AS CHAIRMAN OF THE SELECT COMMITTEE ON INDIAN AFFAIRS AND THE PRIMARY SPONSOR OF THE INDIAN GAMING REGULATORY ACT, I AM CONSTANTLY BEING APPROACHED WITH REQUESTS TO OPEN UP THE ACT AND AMEND THE ACT – THESE REQUESTS COME MOSTLY FROM THE STATE GOVERNMENTS.

AND SO, GIVEN THE CURRENT STATE OF AFFAIRS, I WOULD ASK OF MY COLLEAGUES IN THE STATES THAT ARE CONCERNED ABOUT THIS ACT – WHAT I CONSIDER TO BE THE THRESHOLD QUESTIONS AT THIS STAGE –

IF THE STATES DON'T WANT A FEDERAL COMMISSION –

IF THE STATES DON'T WANT TRIBAL/STATE COMPACTS –

IF THE STATES DON'T WANT THE SECRETARY OF THE INTERIOR TO PRESCRIBE COMPACTS –

IF THE STATES DON'T WANT THE INTERIOR SECRETARY TO PRESCRIBE PROCEDURES FOR THE CONDUCT OF CLASS III GAMING ON INDIAN LANDS –

WHAT DO THE STATES WANT?

AS CHAIRMAN OF THIS COMMITTEE, AND AS ONE WHO IS SWORN TO UPHOLD THE LAWS OF THE UNITED STATES, THIS IS MY QUESTION AND THE PREDICAMENT I FACE.

DO WE ALL TAKE THE POSITION THAT *CABAZON* CONTROLS AND LET CHAOS PREVAIL?

TO ALLOW THE ISSUE OF INDIAN GAMING TO LINGER IN THIS IMPASSE IS NOT WORTHY OF THOSE OF US WHO BELIEVE OURSELVES TO BE LEADERS.

IT IS NOT FAIR TO THE INDIAN NATIONS.

SO I ASK, WHAT SAY YOU – STATES?

IF IT IS YOUR INTENTION TO MAKE A DEAD LETTER OF THE LAW – THE INDIAN GAMING ACT – THEN BY YOUR ACTIONS YOU WILL COMPEL OUR ACTION . . .

SHALL IT BE A FEDERAL COMMISSION? SHALL IT BE COMPACTS BETWEEN THE UNITED STATES

AND THE INDIAN NATIONS? SHALL WE LEAVE THIS ALL UP TO THE SECRETARY OF THE INTERIOR? OR DO YOU WANT SOME SAY IN WHAT GOES ON – AND IF SO, WHY DO YOU SEEK TO ELUDE THE VERY PROVISIONS OF THE LAW THAT YOU FOUGHT SO HARD TO SECURE?

IN THE COMING DAYS, I WILL BE CONTACTING THE GOVERNORS AND THE ATTORNEYS GENERAL OF THE CONCERNED STATES, AND I WILL BE ASKING THESE QUESTIONS OF THEM.

FOR THOSE OF US WHO ARE CHARGED WITH CARRYING OUT THE FEDERAL TRUST RELATIONSHIP, THIS IS A DILEMMA THAT DEMANDS IMMEDIATE RESOLUTION. THE REGULATIONS OF THE DEFINITIONS FOR CLASS II AND CLASS III GAMING WILL GO INTO EFFECT TOMORROW.

U.S. ATTORNEYS HAVE ADVISED THE COMMITTEE THAT THEY WILL PURSUE ENFORCEMENT OF THE ACT'S DEFINITIONS, AND IN THE MEANTIME, GIVEN THE ACTIONS OF THE SEVERAL STATES, THE TRIBAL GOVERNMENTS HAVE NO MEANS OF SECURING A COMPACT THAT WOULD PRE-EMPT THE APPLICATION OF THE JOHNSON ACT AND THE ENFORCEMENT OF THAT ACT.

THIS IS UNFAIR TO THE INDIAN NATIONS, AND I FOR ONE, CHARGED WITH THE DUTIES OF THE SUPREME TRUSTEE, WILL NOT ALLOW THIS SITUATION TO CONTINUE. I WILL LOOK FOR A RESPONSE, BUT I WILL ALSO TAKE ACTION.

I WILL NOT ASK THE TRIBAL GOVERNMENTS TO WAIT FOR SIX MONTHS OR A YEAR – I WILL NOT ASK THE INDIAN NATIONS TO FOREGO THE LIMITED ECONOMIC OPPORTUNITIES THAT GAMING OPERATIONS AFFORD TO THEM, FOR THE SEVERAL YEARS THAT IT MAY TAKE TO APPEAL THESE ELEVENTH AMENDMENT CASES TO THE SUPREME COURT.

I WILL CALL UPON THE LEADERS OF STATE AND TRIBAL GOVERNMENTS TO WORK WITH ME TO EFFECT A RESOLUTION NOW.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

YAVAPAI-PRESCOTT INDIAN TRIBE, et al.
v. ARIZONA, et al.

No. M 93-00001 PHX (D. Ariz., Feb. 15, 1993)

Summary

The district court-appointed mediator selects the proposed tribal-state gaming compacts of the White Mountain Apache Tribe, the Pascua Yaqui Tribe and the Tohono O'odham Nation pursuant to the provisions of the Indian Gaming Regulatory Act.

Full Text

Before GORDON, Mediator

GORDON, Mediator

Mediator's Selection of Proposed Gaming Compacts

Preface

Pursuant to this court's order dated December 16, 1992, the undersigned undertook his obligations as mediator pursuant to 25 U.S.C.S. § 2710, one of the provisions of an act of Congress popularly known as the Indian Gaming Regulatory Act, appearing generally as 25 U.S.C.S. § 2701 *et seq.* In obedience to the same order of this court, the White Mountain Apache Tribe, the Pascua Yaqui Tribe and the Tohono O'Odham Nation each on December 18, 1992, presented to the mediator, its last best offer for a gaming compact with the state of Arizona, and the state of Arizona simultaneously and on the same date

submitted to the mediator its last best offers for gaming compacts with each of said Indian tribes, copies of each having been filed with this court. Since that time, the parties have submitted a great deal of information to the mediator in the forms of reports, affidavits, briefs, memoranda, and excerpts from some pleadings filed in this matter. In addition, the mediator spent five days in on-site visits to the reservations of the plaintiff/intervenors viewing portions of the reservations, meeting with tribal officials, and with city, county and state officials from communities in or near the reservations in order to obtain information concerning the impact of each of the proposed gaming compacts. In addition, I interviewed many witnesses, expert and otherwise, offered by both sides, concerning gaming in Arizona, both tribal and non-Indian, as it existed in the past, as it exists presently, and their predictions as to what the effects would be in each of the scenarios represented by the offers of compacts of each party. The parties have also submitted to me information concerning tribal gambling in states other than Arizona where such gambling has been in effect since Congress adopted the Indian Gaming Regulatory Act. In addition, the parties have cited me to several federal court decisions interpreting the meaning and scope of that Act.

The role of the mediator, in general, under the Indian Gaming Regulatory Act is made difficult by the fact that the Act itself is both vague and incomplete in many respects regarding the types and scope of class III gaming required to be negotiated between the state and the tribes. Further, under the Act, true mediation is not contemplated: the mediator is forced to choose one of two

competing compacts in its entirety. He may not pick and choose the more acceptable portions of each and meld them together into a compact more acceptable to each party or to suggest concessions to be made. Further, apparently Judge Rosenblatt, in an abundance of caution to avoid violation of the state of Arizona's rights under the tenth amendment to the United States Constitution, purposely avoided determining the specific types of class III gaming required to be negotiated between the state and the tribes. Therefore, the mediator finds himself in the position of being required to do just that in making his choice of the compacts submitted.

Selection of Compacts

After having considered all of the matter submitted by the parties, in my role as mediator under the Indian Gaming Regulatory Act, I hereby select the following compacts from those submitted to me:

1. As between the last best offer compacts of the state of Arizona and the White Mountain Apache Tribe, I select the compact proposed by the White Mountain Apache Tribe as being that which best comports with the terms of the Indian Gaming Regulatory Act, other applicable federal law and the findings and order of the court. As a consequence, I reject the proposed compact of the state of Arizona.

2. As between the last best offer compacts of the state of Arizona and the Pascua Yaqui Indian Tribe, I select the compact proposed by the Pascua Yaqui Indian Tribe as being that which best comports with the terms of

the Indian Gaming Regulatory Act, other applicable federal law and the findings and order of the court. As a consequence, I reject the proposed compact of the state of Arizona.

3. As between the last best offer compacts of the state of Arizona and the Tohono O'Odham Nation, I select the compact proposed by the Tohono O'Odham Nation as being that which best comports with the terms of the Indian Gaming Regulatory Act, other applicable federal law and the findings and order of the court. As a consequence, I reject the proposed compact of the state of Arizona.

Reasoning Underlying Selections

Although it is not required under the Act, I feel it important for the parties, the court, and the public to be aware of the reasons I selected the compacts submitted by the Indian tribes rather than those of the state. Perhaps those reasons will be of interest to the Secretary of the Interior in the event the state refuses to accept the selected compacts.

My first concern as mediator was to discover why Congress passed the Indian Gaming Regulatory Act in the first place. Its reasons are succinctly stated at the very beginning of the Act:

#2702 Declaration of Policy

The purpose of this Act is –

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means

of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influence, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and the players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

Oct. 17, 1988, P.L. 100-497 #3, 102 Stat. 2467.

It is obvious that this Act was intended to give America's Indian tribes a source of revenue not previously available to them to somehow compensate for the generations of neglect that both state and federal governments have allowed to occur to reservation Indians. It seems to me that those who drafted the Act's declaration of policy must have had in mind the difficult situation in which many Indian tribes find themselves today, especially the tribes involved in this case. For whatever reasons, neither the state nor the federal government has furnished adequate revenue to provide for the needs of these tribes in areas of health, education, economic development, or governmental infrastructure. Also, the tribes, though varying in degree between them, lack tax bases and natural resources to generate returns sufficient to provide

those necessities. Each of the tribes involved has unemployment rates several times that of Arizona as a whole. Indians on these reservations have exceptionally high rates of alcoholism, drug abuse, school dropouts, teen suicides and pregnancies and adult suicides. The rate of functional illiteracy among tribal members in each of the tribes involved greatly exceeds the rate in the rest of Arizona. In all three tribes, depression and feelings of hopelessness prevail. Their leaders see no light at the end of the tunnel: no hope that things will change and get better. None of the tribes would favor gambling as its primary resource if other sources of revenue were available. Yet the tribes see the opportunities under the Indian Gaming Regulatory Act as being the only ones left to them which will provide a "jump start," to give them the money: to provide a higher level of quality education to their young and old so they can compete in the Anglo economic world; to preserve their cultures; and to fulfil the most basic needs of housing and health care to their people.

Although I have resided in Arizona all but six months of my life, and have seen living conditions on several Indian reservations in Arizona, I was shocked to see the substandard housing, medical and educational conditions that existed on the Tohono O'Odham Reservation. The elderly, sick and disabled on that reservation live in conditions not unlike many third world countries in Africa today. To a lesser degree, many of the conditions I observed on the Tohono O'Odham Reservation exist on the other two reservations. The White Mountain Apache tribal courts cannot function because of lack of courtroom space. That tribe also has no juvenile detention facility,

and it must house juvenile offenders in the same facility with adults. These conditions would not be allowed to exist anywhere else in Arizona. Even counsel for the state in this matter did not dispute the dire economic needs of the tribes involved.

The tribes' economic needs no longer being in doubt, my main task as mediator was to decide which of the submitted compacts, the state's or the tribe's, "best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court" as required by the Act.

By the terms of 25 U.S.C.S. [sic] § 2710(d)(1), class III gaming activities shall be lawful on Indian lands only if such activities are:

> (B) located in a State that permits such gaming for any purpose by any person, organization or entity, and
>
> (C) conducted in conformance with Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.
>
> . . . .

Paraphrasing section 2703 of the Indian Gaming Regulatory Act, class I gaming is defined as meaning social or traditional games usually engaged in by Indians for prizes of minimal value and in connection with ceremonies. Class II gaming includes bingo, pull tabs, lotto, punch boards, tip jars, instant bingo, and card games that are allowed by the state. Banking card games, including baccarat, chemin de fer, blackjack, electronic facsimiles of any game of chance, and slot machines are specifically

excluded from class II gaming. Class III gaming, the primary one in contention in this case, is defined as "all forms of gaming that are not Class I gaming or Class II gaming."

By inference all banking card games and the machines in question here are included within class III, as well as a lottery, and parimutuel wagering on dog or horse races.

The main differences between the compact offers of the state and the tribes is in the number of the machines to be allowed, and whether dice and card table games will be permitted.

The state of Arizona takes the position that the Indian tribes in Arizona should not be allowed to operate any type of gaming operation on their reservations that it has not permitted to be operated off the reservations. Although willing to allow a limited number of video gaming machines, Arizona would not allow the Indians to operate table games such as dice, poker or blackjack operated by live dealers. The tribes seek not only to have a larger amount of machines, but would have table games as well.

It is undisputed that several types of gaming defined as class III gaming under the Indian Gaming Regulatory Act are being operated in Arizona. The state of Arizona itself has raised over 1.5 billion dollars in revenue through its statewide lottery and related instant games since the lottery was adopted in Arizona in 1981. Currently several lottery drawings occur each week. The state of Arizona spends in excess of eight million dollars a year to advertise its lottery games and to encourage the

public to buy tickets. Television, radio and newspapers in Arizona are replete with advertisements to induce Arizonans and visitors to gamble in the state's games. Some of the state's instant games provided by the state are scratch cards which pay the player if he or she ends up with winning combinations of symbols identical with those used in mechanical or electronic slot machines. Other instant games provide likenesses of playing cards, which pay the player if combinations are obtained which would be winning hands at poker or blackjack. Lotteries and slot machines, whether mechanical or electronic, are class III gaming devices under the Act.

Arizona allows parimutuel wagering in both horse and dog tracks in the state, and has recently authorized off-track betting in sports bars and other establishments statewide. The state regulates the industry and receives substantial revenue from taxes generated from its operation.

Social, as opposed to commercial gambling, is permitted in Arizona, without regulation. Also, the manufacture, sale and possession of slot machines are permitted in Arizona, without regulation.

Charity "Las Vegas Nights" or "Casino Nights" are permitted in Arizona, without regulation. In such events non-profit organizations can raise funds for charitable purposes by providing full-scale casino type gambling to its patrons, including blackjack, poker, dice, roulette, and slot machines. Although reliable statistics were not available on short notice at the request of the mediator, the evidence presented showed that the occurrence of such charitable casino nights was frequent and statewide.

A description of the state of gambling in Arizona is given in this case by Professor William M. Thompson, of Las Vegas, Nevada, an expert in the field of gambling:

> Gambling in Arizona is permitted and consistent with the public policy of the State of Arizona. A wide range of gaming activities occur within the state. Arizona permits more forms of gaming than any other state in the southwest, with the exception of Nevada. Arizona permits charity casino nights, bingo, pull tabs, instant lottery, lotto; dog racing, harness racing, quarter horse racing, thoroughbred racing, both interstate and intrastate betting, off-track betting, tele-theatre betting, as well as the retail sale of slot and video machines. Clearly, Arizona is a gambling state. In Arizona gambling activity – including casino games – is permitted. The permitted forms of gambling activity in Arizona are almost identical to those permitted in California with these exceptions: Arizona has dog race betting which California does not, and California has commercial card rooms which Arizona does not. California permits the sale of antique machines only, whereas modern video and slot type machines are readily available and widely sold in Arizona; and California does not permit charity casino nights. In the famous *Cabazon* case, the United States Supreme Court determined that the gaming policy of California was civil and permissive in nature and not criminal or prohibitory in nature. Virtually all of the forms of gambling permitted in California are also played in Arizona. Like California, the State of Arizona receives considerable tax revenue from gaming activity conducted in the state. Arizona state lottery revenues rank 16th highest in the United States and state income (from) gambling exceeds one-third of the amount the State of Nevada realizes from taxation of gambiing operations.

Arizona has long since passed the time when it prohibited gambling. It now not only allows it, but encourages it, in a great many forms. Arizona relies on gambling to a great extent in raising revenue to avoid higher taxation on its residents. In my opinion none of the types of class III gambling being sought by the tribes now violates public policy in Arizona. The types of gaming sought in the tribes' compact should be included within those negotiated in gaming compacts with Indian tribes in Arizona. It seems cruel to allow non-Indian charities in Arizona to use casino gambling to raise substantial sums of money for such purposes as: providing scholarships for educational needs; raising money for medical services and supplies for the sick, the elderly and the disabled, and yet to deny the Indian tribes in Arizona that same opportunity for the very same purposes.

I do not base my opinion that class III gaming already is the public policy of Arizona merely on the allowance of charity casino nights alone, however. Permitting horse and dog racing and parimutuel betting on those events took Arizona on the first step into class III gaming. Then the biggest step was taken when the voters of Arizona decided that Arizona should run a state-sponsored lottery. It was made clear then that the citizens of Arizona wanted class III gambling. I also feel that there is no principled difference between the state's own instant type of blackjack played on Arizona's scratch game and the situation where a person sits across the table and

receives cards from a live dealer. The same logic applies to video machines which display symbols of playing cards. To me, both are the same as the live dealer table games, except perhaps in speed of play. All of the above are class III gaming under the Indian Gaming Regulatory Act, and are permitted in Arizona. Therefore, comparable games should be negotiable within a proposed gaming compact with Indian tribes.

As to the question of the great discrepancy between the offered compacts in the number of machines, the state's offers of 250 video machines to each of the tribes herein displays an apparent lack of regard for the significant differences in the various tribes' population, demography, geography, and economic and social needs. For the small tribes with which the state has already compacted, this limitation may be justified, as the income thereunder may indeed be satisfactory to them. However the needs of the tribes involved in this action are so much greater that it makes the state's "one-size-fits-all" offer seem arbitrary.

I am unimpressed with the state's argument that the greater number of machines requested by the tribes herein, phased in over the periods requested, would overwhelm the state's ability to investigate and certify the persons and machines involved. This argument is belied by the fact that the tribes compacts offer to pay all reasonable costs for the state's assistance. If Arizona does not have enough investigative personnel to handle the increase in work, the tribes' offers would cover the costs of the additional hires. Further, as prescribed in the

Indian Gaming Regulatory Act, the primary responsibility for regulation of the Indian gaming and enforcement of the laws is directed to fall on the tribes, the U.S. Justice Department, the National Indian Gaming Commission and the Interior Department. Although the National Indian Gaming Commission seems to be slow to gear up to its responsibilities, it is to be assumed that all these departments of the U.S. government will indeed fulfill their legal obligations under the Act.

In conclusion, I would state that my selection of compacts in this case is based on the state and federal law as it exists today. Things might be different if Arizona would hereafter legislatively abolish all class III gaming, or if Congress were to amend the Indian Gaming Regulatory Act to preclude the tribes offers under the Arizona circumstances. However, speculating as to what would happen if those things or either of them occurred is not within my responsibilities as mediator. Those are matters of public policy, best arrived at by either the Arizona Legislature or the U.S. Congress. However, I hope that any such legislative changes will not be sought in a spirit of retaliation against the tribes, or without first providing Indian tribes with adequate means to address the serious problems I have referred to above.

Copies of this selection of compacts will be faxed today to counsel for all parties, as this date is a federal holiday and the office of the clerk of the U.S. district court is not open to receive it to be filed. My selection will be considered made today, however, and submitted to the state on this date, in order to comply with the court's order to have the selection made by February 15, 1993. A copy will be hand delivered to the clerk of the

U.S. district court tomorrow, February 16, 1993, and copies formally will be mailed to the parties on the same date.

[*reprinted in* 20 Indian Law Reporter 3081 (1993)]